

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF TEXAS

3 SAN ANTONIO DIVISION

4 EVA MARISOL DUNCAN,
Plaintiff,

§

§

§

5 V.

§ CIVIL ACTION NO: 5:14CV912-FB

§

6 JPMORGAN CHASE BANK, N.A., § April 27, 2016

§

7 DEFENDANT.

§

8
9
10 TRANSCRIPT OF FAIRNESS HEARING
11 BEFORE THE HONORABLE JOHN W. PRIMOMO
MAGISTRATE COURT JUDGE

12 APPEARANCES:

13 For the Plaintiff:

BENJAMIN R. BINGHAM
Bingham & Lea, P.C.
319 Maverick Street
San Antonio, TX 78212

15 CHARLES ANTHONY RILEY
16 Riley & Riley, Attorneys at Law
320 Lexington Avenue
17 San Antonio, TX 78215-1913

18 CHARLES DARBY RILEY
Attorney at Law
320 Lexington Avenue
19 San Antonio, TX 78215

20 H. ANTHONY HERVOL
21 Law Office of H. Anthony Hervol
4414 Centerview Drive
22 Suite 200
23 San Antonio, TX 78228

24 Produced by mechanical stenography; computer-aided
25 transcription

Leticia Ornelas Rangel, CSR

1 APPEARANCES CONTINUED:

2 For the Defendant: NOAH A. LEVINE
3 Wilmer Cutler Pickering Hale and Dorr LLC
4 250 Greenwich Street
5 New York, NY 10007

6 WILLIAM LANCE LEWIS
7 Quilling Selander Lownds Winslett & Moser, PC
8 2001 Bryan St., Suite 1800
9 Dallas, TX 75201
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Leticia Ornelas Rangel, CSR

P-R-O-C-E-E-D-I-N-G-S

THE COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated. The case before the Court is Eva Marisol Duncan v. JPMorgan Chase Bank et al. And I'll ask for announcement from counsel for the plaintiff and then for the defendant.

MR. BINGHAM: Good morning, Your Honor, Ben Bingham for the Plaintiff and the Class.

MR. HERVOL: Morning, Your Honor, Tony Hervol for the Plaintiff and the Class.

MR. RILEY: Your Honor, Darby Riley for the Plaintiff and the Class.

MR. RILEY: And I'm Charles Riley also for the Plaintiff and the Class.

THE COURT: On behalf of the defendant?

MR. LEWIS: Lance Lewis on behalf of defendant JPMorgan Chase Bank, N.A..

MR. LEVINE: And Noah Levine, Your Honor, on behalf of the defendant JPMorgan Chase Bank, N.A..

THE COURT: Okay. And I understand there are some individuals who are here who are going to be objecting to the settlement, and I will be asking you for your names and comments later in this hearing. The purpose of this hearing is to determine whether or not the settlement is fair, whether the notice of the settlement and the settlement are

Leticia Ornelas Rangel, CSR

1 fair, reasonable, and adequate, and including whether or not
2 the plaintiff's request for attorney's fees is a reasonable
3 request. And there's also the matter of a service payment to
4 the class representative. And the Court will also consider
5 any timely filed objections to the settlement.

6 The Class was certified regarding a -- I believe it
7 was a -- I don't have the specific notification or Class in
8 front of the -- involved. I think it involved allegations
9 that JP Morgan Chase bank was looking at accounts of
10 individuals who no longer had active accounts at their bank.
11 And there's some question as to the validity of that. And I
12 think the parties -- this lawsuit was filed in October 2014
13 or thereabouts, and the parties eventually reached a
14 settlement. And as in any Class action settlement, it has to
15 be something that is approved by the Court after notification
16 is provided to the parties, to all the potential Class
17 members. Class notice was approved by the Court back in
18 December. I think Class notices were sent out. I think
19 they, the Class members -- and I think there was somewhat
20 over 2 million potential Class members. I think somewhat
21 over 400,000 Class members responded by the deadline in
22 March. Some opted in. Some filed claims. Some opted out.
23 And then some individuals have objected to the settlement in
24 writing. Some of those individuals will not be here today,
25 but their objections will still be considered by the Court.

Leticia Ornelas Rangel, CSR

1 And any individual who objects to this settlement who are
2 here today will have the opportunity to put their objections
3 on the record.

4 The first matter that the Court must consider is --
5 concerns the adequacy of the Court notice. I don't recall
6 that anyone objected to the adequacy of the notice of the
7 settlement. Mr. Bingham, Mr. Lewis, are you aware that
8 anyone objected either in writing or otherwise to the
9 adequacy of the settlement notice?

10 MR. BINGHAM: No, Your Honor, you're correct. No
11 one objected.

12 THE COURT: Okay. Mr. Lewis?

13 MR. LEWIS: That's correct, Your Honor.

14 THE COURT: Okay. Then I think we'll get into the
15 matter of the Fairness of the Settlement. I think a motion
16 to approve the settlement has been filed, and I really can't
17 recall now if that was filed by the -- by both parties or
18 just by the plaintiff.

19 MR. BINGHAM: Just by the plaintiff, Your Honor.

20 THE COURT: Okay. If you would, Mr. Bingham, don't
21 go into a long dissertation about the -- you know, everything
22 in that motion. But state on the record why you believe the
23 settlement is fair to the Class members in this case.

24 MR. BINGHAM: Your Honor, I have copies of the
25 actual motion and the exhibits, if that would be helpful.

1 THE COURT: I have that. I don't need that.

2 MR. BINGHAM: All right. Thank you.

3 The settlement is fair, adequate, and reasonable
4 for several reasons: First, it requires Chase to provide
5 annual audits of its--.

6 THE COURT: If you could, again, state for the
7 record -- I bumbled through stating exactly what the problem
8 was and what the Class consists of. If you could be more
9 specific about that for the people who are here.

10 MR. BINGHAM: Sure. The Class consists of people
11 who no longer have an account with Chase, people who have
12 either paid their accounts, been foreclosed on, and don't owe
13 any money after the foreclosure, have discharged their
14 personal liability and bankruptcy, and then there's a few
15 other short-sale transactions and things like that. So it's
16 basically people who fell on hard times that is primarily due
17 to the mortgage crisis, either lost their homes or would go
18 bankruptcy and discharge their personal liability. Some are
19 still in their homes. But the thing they have in common is
20 they don't owe Chase any money. The other thing they have in
21 common is they're very --

22 THE COURT: Did all these people -- all these
23 accounts are people who owed money to Chase?

24 MR. BINGHAM: Yes, they're all former customers.

25 THE COURT: Okay.

Leticia Ornelas Rangel, CSR

1 MR. BINGHAM: At one time they did owe money to
2 Chase.

3 THE COURT: Okay.

4 MR. BINGHAM: And now they don't.

5 THE COURT: Okay.

6 MR. BINGHAM: They're all former customers. So
7 they're all people, too, that are trying to rebuild their
8 credit, so what's in their credit report is very important to
9 them. Credit reports are very complex. I don't know if
10 you've looked at yours lately, but they're hard to decipher.

11 THE COURT: No, I'm afraid to.

12 MR. BINGHAM: So these are people that are trying
13 to put it all back together. And Mrs. Duncan is a good
14 example, Your Honor, she is here today.

15 THE COURT: Okay.

16 MR. BINGHAM: She actually had her house foreclosed
17 on when her understanding was that it wouldn't be foreclosed
18 on. Litigation ensued, and she actually repurchased the
19 house for full -- paid off Chase completely. So she was a
20 former Chase customer who didn't owe Chase any money. And
21 she is in the industry. She assists people with financing
22 their manufactured homes. So she can read her credit record.

23 THE COURT: Could you pull that microphone a little
24 bit closer to you?

25 MR. BINGHAM: Sure.

Leticia Ornelas Rangel, CSR

1 THE COURT: Thank you, sir.

2 MR. BINGHAM: She is in the industry, so she could
3 recognize that Chase was continuing to access her credit
4 report after she did not owe Chase any money. Now,
5 technically, there's not damages to people by what we call
6 soft pulls. These are transactions where Chase looks at the
7 former customers' credit report. But nobody else can see it,
8 and it doesn't affect the credit score. That's called a soft
9 pull in the industry.

10 THE COURT: What's the purpose of doing that?

11 MR. BINGHAM: Well, we say none. We say absolutely
12 none. Because there's no -- there would be no reason to do
13 that, in our mind. And that's what the lawsuit is all about.

14 THE COURT: They must do it for some reason.

15 MR. BINGHAM: Well, I think--.

16 THE COURT: I don't want to stir things up.

17 MR. BINGHAM: No.

18 THE COURT: I would just like some understanding of
19 it.

20 MR. BINGHAM: Well, I think the real reason is they
21 intend not to. Their systems are designed not to do that.
22 But because they have so many customers in so many different
23 situations, they have loan packages acquired from other
24 lenders, the software may not integrate. Their algorithms
25 may not integrate. It's a complex computer kind of problem

Leticia Ornelas Rangel, CSR

1 that Mr. Hervol is better equipped to talk about. But it's
2 generally not for a purpose of trying to collect a debt
3 because it's not owed, it's been discharged. It's generally
4 not for the purpose of selling the account because the
5 account balance is zero. There have been some -- in other
6 cases, there's been some arguments made about a legitimate
7 purpose to pull these. But in our view there is none.
8 There's absolutely no reason.

9 THE COURT: Do you believe that that's one of the
10 reasons it might make proof of willfulness difficult?

11 MR. BINGHAM: That certainly is. And that's why we
12 think this case is a little unique, though, because in our
13 mind the willfulness is the failure to audit because their
14 own system shows that they're not supposed to be doing that,
15 but nobody is checking the system to see if the system is
16 working. That's where we say the willfulness is, not in, you
17 know, I can't imagine a reason why a creditor would willfully
18 and intentionally go out and pull one on a closed account,
19 unless perhaps sell the information to someone else. But I
20 mean, the information that's in your credit report is pretty
21 readily available.

22 But that's -- that brings up another point. What's
23 in your contract report, and these people are trying to
24 rebuild their credit, and they have got basically a former
25 creditor or a stranger pulling their credit report that has

1 their name, their former names, all their addresses, their
2 social security numbers, every account they've ever had. All
3 that stuff is in the credit record. So these people are
4 sensitive about somebody looking in. The example we used in
5 discovery is, to the witness, let me see what's in your
6 wallet. And it's even worse than that. It's worse than
7 looking at somebody's wallet without a purpose, because
8 there's more information on the credit report than there is
9 in your wallet. But it's the same kind of thing. It's
10 not -- you're not damaged in a legal sense because someone
11 picks up your wallet and starts thumbing through it. But
12 it's highly offensive, and you don't want it to happen. You
13 want to protect your private information. So that's what the
14 case is about.

15 And in the briefing you will see this is the second
16 time a case has been brought against Chase. The first case
17 was actually prosecuted by Mr. Hervol, and it was Chase's
18 credit card unit. This is mostly mortgages in this case.
19 But the credit card unit was in a Class action here in the
20 Western District that settled in 2009. So, legally, we say
21 that helps our willfulness argument. But we still have a lot
22 of hurdles to overcome to get there. The law which we've
23 briefed out is that it's not Chase's behavior that's at
24 issue, it's whether their behavior is objectively
25 unreasonable in their interpretation of the Fair Credit

Leticia Ornelas Rangel, CSR

1 Reporting Act as it affects these count reviews. And the
2 Supreme Court when addressing willfulness says: To determine
3 willfulness you look for this objective behavior, and you
4 look for circuit court authority or regulatory authority. We
5 don't have either of those in this case that is helpful to
6 the plaintiff. The only circuit court authority says: The
7 Fair Credit Reporting Act is ambiguous as to whether a
8 creditor can or cannot pull a closed account. So the only
9 circuit authority is against us on that point. And the same
10 case, the *Levine* case, says that it -- even if they -- their
11 interpretation was correct, the willfulness standard would be
12 lacking because there's no authoritative guidance. And the
13 interpretation by the creditor, if it's ambiguous, how can
14 you hold him willful. That's basically what it comes down
15 to. If the statute is ambiguous, you can't find the creditor
16 willfully violated it.

17 Our argument is, that's fine for that case, but in
18 this case you have the same creditor doing the same thing a
19 second time. The Court has to look at the subjective in --
20 procedures, I guess, as part of the willfulness inquiry. We
21 think we probably will lose at the trial court level and have
22 to go to the Fifth Circuit on that just because the law is
23 what it is, and we've briefed that out. But that's why we
24 took the case. We just couldn't believe that common sense
25 would be entirely lacking even in the FCRA cases. So that's

Leticia Ornelas Rangel, CSR

1 what the case is about.

2 Mr. Hervol and I have done three or four or five of
3 these type of cases. I was originally in the *Sleezer* case.
4 We've done American Express. We've done United San Antonio
5 Federal Credit Union. Maybe that's it. I can't remember.
6 So we're familiar with the -- how to get the discovery we
7 need and how to formulate the information that we need. All
8 but one of those cases has settled. One case we lost at the
9 certification. We didn't get it certified, I guess the
10 American Express. But we've got some good experience and so
11 we know what we're doing and we know what to look for, and we
12 know how to recognize a case, which this is kind off going
13 off in different directions, but our expert is here, Evan
14 Hendricks.

15 And one of the things he talks about is the
16 education and value of the settlement in itself because the
17 notice did go out and we got about 2.1 million notices went
18 out, and we reached a 94 percent, what they call re-trade.
19 We believe that 94 percent of the Class members actually
20 received the notice. And so even if they didn't file a
21 claim, they got notice of what the lawsuit was about and that
22 there was a contention that this account was used on a closed
23 account, was a claim that they could do something about. And
24 we've just been inundated with calls from the Class members,
25 and a lot of people are just saying, I didn't know it was a

Leticia Ornelas Rangel, CSR

1 claim. I saw that they were pulling it. But I didn't know
2 it was anything. And I didn't know I could do anything about
3 it. Thank you. We got a lot of calls like that so.

4 Anyway, so the settlement the -- is fair,
5 reasonable, and adequate because what we did get is this
6 audit procedure whereby Chase will implement procedures for
7 three years to conduct audits to make sure that it's not
8 pulling the credit reports of people who have closed
9 accounts. And those accounts include the same definition
10 that is in our Class definition. So we think we're going to
11 get the process stopped.

12 Our expert calls that a landmark change and calls
13 it an important change. And the reason he does -- one of the
14 objectors said something, well, the injunctive relief has no
15 value because that's what Chase is supposed to do anyway.
16 Maybe so, but Chase isn't doing it. Chase has no legal
17 obligation to conduct these audits. But now it's agreed to.
18 And that has value to the Class members because they're no
19 longer going to sue Chase for pulling their credit reports.
20 In fact, we've seen that since the case has been pending.
21 Mr. Hervol does bankruptcy law, and as far as that he pulls
22 the credit reports of clients and potential clients. So
23 we're looking at it, and it appears the process has stopped.
24 So that's a benefit to the Class members.

25 The educational benefit I briefly mentioned, that's

1 a real thing too. We believe from literally between the
2 three firms, thousands of calls from Class members and
3 probably less than five complaining about anything. I mean,
4 people are understanding the notice. They're thankful. Our
5 phone numbers are not even on the Class notice. They have to
6 hunt us down to call us. There's no toll free number to the
7 lawyers. There is to the settlement administration. People
8 are hunting us down to say thank you. So that's a part
9 of the reason the settlement is fair. It brings value to the
10 Class members regardless of whether they filed a claim. That
11 value extends to all the Class members, to the general public
12 as well.

13 But for those who file a claim, and there were 400,
14 we just reached 473,000 people filing the claims. For those
15 who filed it, they share pro rata in this \$8.75 million fund
16 that Chase has agreed to put up. The settlement is fair,
17 adequate and reasonable because 8.75 million is only the
18 second common fund in these type of cases. And there's
19 probably maybe a dozen reported cases. It's only the second
20 common fund. The other common fund was approved in the
21 settlement by Judge Nollack, that's United King v. United
22 Federal Savings or Federal Credit Union. That fund was
23 500,000. So this one is 8.75 million. So it's by far the
24 largest fund. It's only the second common fund in this type
25 of case. It's only the second one that provides actual money

Leticia Ornelas Rangel, CSR

1 to people versus coupon-type of things. And most of the
2 other settlements have, you know, like credit monitoring or a
3 free credit report or a free credit score or something like
4 that. That's kind of what the relief is. But the response
5 rate on those cases is miserable.

6 There's that chart we brought today, and it's in
7 our briefing also, that just compares this case to these
8 other similar cases. In that *Sleezer* case there were two
9 claims. It offered credit monitoring. And most of those
10 cases, it's just a dismal response rate from the client --
11 from the Class. We've -- in our briefing, we've gone
12 through -- there's not that many FCRA cases, but there are
13 cases under the Telephone Consumer Protection Act, which are
14 just rampant right now. And that claim rate, the
15 participation rate of the Class members in those cases is
16 averaging between 5 and 6 percent. In this case, we have
17 22-plus-percent of the people actually filing the claims,
18 which is unheard of in this business.

19 One of the judges in Chicago had the Class counsel
20 go survey cases from all over the -- well, from four circuits
21 I believe to try to identify the claim rate in TCPA cases.
22 There was one case that hit 19 percent. And I have got a
23 list of those, if you would like to look at it. One case hit
24 19 percent, two or three went over ten. Some of them were
25 less than a percent. But the average was 5.4 percent of the

Leticia Ornelas Rangel, CSR

1 people participating. We've got just an unheard of claim
2 rate in this case. And it's because people get it and
3 they're interested. And it's also because part of our
4 notice, the notice was a claim form, and I brought a copy
5 here, if you need to see that. But it was a claim form that
6 was double-sided, folded over, and it's all the person had to
7 do was read it, sign their name, update their address,
8 certify that they wanted the funds, and mail it back. And
9 the mailing was postage prepaid. So it didn't even cost them
10 the stamp to mail it back.

11 We made it as easy as possible to participate in
12 this case because we didn't want to get stuck with a case
13 where, you know, 5 percent of the people had responded. So
14 as a result of good notice and understandable notice, we got
15 this huge claim rate, which is one of the factors the Courts
16 look at to decide is this a fair, reasonable, and adequate
17 settlement. We have got a huge participation rate. We have
18 as of today I think 181 people who have opted out. And I'm a
19 lawyer because I can't do math, but that's less than --
20 that's a fraction of one percent. 181 out of 2.1 million
21 have opted out of the settlement. And from conversations
22 with Class members, I can tell you that a lot of those people
23 are people who went through bankruptcy, got a discharge, but
24 remained in the house. And they didn't want to take any risk
25 with Chase by filing a claim. They thought if they filed a

Leticia Ornelas Rangel, CSR

1 claim, Chase might kick them out of the house or something
2 like that. We told them, no, but at the same time I can tell
3 you they considered that a part of the risk, and that's part
4 of the reason they opted out of the settlement.

5 We have -- we're down to two attorney objections
6 out of 2.1 million people. Well, that's a factor the Courts
7 look at. Is the settlement fair. We have two objections
8 both of -- it's all briefed out, both from professional
9 objectors. These are guys who object in every settlement
10 they can. It's boilerplate objections. There's not a single
11 fact in either one of those objections. They -- Mr. Cox is
12 here. Mr. Bamus didn't show up. If the Court approves the
13 settlement, they will file a notice of appeal, and they will
14 ask us to pay part of our attorney's fees as part of the -- I
15 call it extortion, to get rid of the appeal and get the
16 settlement administration underway. In other words, nobody
17 in the Class gets anything until these two guys get their
18 money. That's what's going on here.

19 We have -- there's one other group from Chicago
20 that we filed a motion to strike the objection because Marlin
21 Paul had not filed a claim. The Court granted that. Her
22 significant other is an 80 year-old lawyer who has contacted
23 us, contacted defense counsel, has another buddy who is a
24 lawyer, who has contacted defense counsel. We thought that
25 they might be here today. They said they had mailed in a pro

1 hac motion ten days ago now. So we don't know what their
2 status is, but we would ask that the Court, when reviewing
3 the objections just review the Marlin Paul objection too
4 because it's really no different than the others and just
5 consider that and overrule that.

6 THE COURT: Let me get back to some of the factors,
7 though, that you dealt on most of them. But one of the them
8 is the complexity, expense, and likely duration of litigation
9 as well as the state of the proceedings and the amount of
10 discovery completed because I do recall reading that someone
11 thought that this was a rush to settlement. And if you
12 address that matter.

13 MR. BINGHAM: Sure. Well, I'll say yes and no. It
14 was a rush -- we filed the case. We got the order to
15 consider at least ABR pretty early in the case. We agreed to
16 mediate the case. And before the mediation, the Supreme
17 Court accepted a writ of certiorari in this case called
18 *Robins v. Spokeo* -- or *Spokeo*. People say it different ways.
19 But that case would impact whether Mrs. Duncan had standing
20 to pursue this claim because the issue there is whether a
21 person without actual concrete injury has standing to pursue
22 an FCRA claim. Mrs. Duncan doesn't have that kind of injury,
23 although we could allege it, if we had to. But in general,
24 because these are soft pulls not seen by anybody, don't
25 affect your credit scores, people don't have damages.

1 So the Supreme Court had once before in a case
2 called *First American*, maybe three or four years ago,
3 accepted cert. on this same issue. And then they dismissed
4 it saying that the certiorari was improvidently granted. So
5 when *Spokeo* came up and they accepted cert. again, all the
6 plaintiffs bar thought, okay, they're going to rule that
7 if -- because all you can allege is a violation, you don't
8 have standing. And courts have bought that. FCRA cases
9 cited in our brief have been stayed pending that decision.
10 TCPA cases have been stayed pending that decision. All kinds
11 of statutory causes of action have been stayed -- FTCPA cases
12 have been stayed all because of the standing issue.

13 So, yeah, we wanted to get a settlement before the
14 decision came out in *Spokeo*, but that doesn't mean that we
15 just layed down and said, hey, you know, whatever you give us
16 we'll take. We had a hard-fraught mediation preceded by
17 extensive briefing. All the cases are in our briefing, but
18 basically from the plaintiff's point of view, in the universe
19 of this type of case there's one case where a court in a
20 single individual action has found a violation that was
21 willful. But in that case the defendant didn't even
22 challenge the violation, so it's not -- it doesn't give us
23 much hope.

24 The Fifth Circuit has ruled that because the FCRA
25 is ambiguous as to whether a creditor can pull on a closed

Leticia Ornelas Rangel, CSR

1 account, there can't be a willful violation. That case is
2 cited in our briefing. The Eleventh Circuit has ruled the
3 same way. There's a couple other cases that deal with
4 bankruptcy folks. Bankruptcy discharges a person's personal
5 liability to repay the debt. But the Court says, yeah, but
6 they still had a house. So the creditor has this -- don't
7 ask me how -- what the reason is. But the court says -- the
8 creditor still -- there's still a creditor relationship
9 because there's still collateral. And so the creditor still
10 has the permissible purpose to pull the former borrower's
11 credit report.

12 So it's against that backdrop that we're
13 negotiating with Chase, and then also the *Spokeo* case comes
14 down. We all brief it out extensively. We go to San
15 Francisco and mediate with Judge Edward Infante, who is a
16 former magistrate judge that kind of specializes in these
17 statutory cases. He's done some of the biggest and probably
18 most of the biggest cases. We mediate with him. We reach a
19 settlement in principal. There's still some due diligence to
20 do. But this is -- we did serve discovery. Chase did answer
21 the discovery. The fact that Chase was doing these pulls was
22 never contested. They admitted that. So it really turns
23 into a legal argument and Class identification and process.
24 And I've been doing this 15 plus years. In the big cases
25 with good lawyers they're usually not resolved with a bunch

Leticia Ornelas Rangel, CSR

1 of discovery battles. Responsible lawyers give you what you
2 want. You talk about it. It's almost like problem-solving
3 type of deal. And it's happened in several different kinds
4 of cases, but you don't -- there's not a bunch of discovery
5 battles. They gave us what we wanted. We didn't have to
6 make formal requests. We did our due diligence. If there
7 was something that came out, we would say, hey, how about
8 this. We would have a conference call or they would produce
9 documents. It was the way it was supposed to be. And
10 we've -- this isn't our first case. So we know when we've
11 got enough money -- or enough information, actually, both, to
12 settle a case.

13 So and that -- and I wouldn't say the negotiations
14 change much after a mediation, but the due diligence
15 continued. The questions went back and forth because we
16 didn't have everything we needed. We needed to verify
17 things. We took a deposition of a Chase officer to verify
18 things. But, you know, that's what we're supposed to do, and
19 we did it. So, you know, everything is relative. Was it
20 early compared to some other cases? Yes. Was it uninformed?
21 No. Is it fair? Yes. It's the biggest of this type of case
22 ever. It's hard to say it's unfair when you look at the
23 other similar cases. It's just head and shoulders above.

24 THE COURT: Anything else on the settlement itself?

25 MR. BINGHAM: I think -- you know what, I talked

1 about the injunctive relief on our procedures. Record date
2 breaking settlement -- record-breaking participation rate. I
3 think that's all I have on the settlement.

4 THE COURT: On the matter of attorney's fees,
5 counsel is asking for a third?

6 MR. BINGHAM: That's right, Your Honor.

7 THE COURT: Okay. And why would you not -- I
8 understand that in this circuit the Court of Appeals tends to
9 prefer the Lodestar.

10 MR. BINGHAM: Well.

11 THE COURT: Is that or is that not true?

12 MR. BINGHAM: I think that's not true anymore.

13 THE COURT: Since when?

14 MR. BINGHAM: Since the *Dell* case in 2012. It's
15 cited in our briefing. In a common fund case, let me qualify
16 that, where a common fund has been created, I don't think
17 since the *Dell* case came out.

18 THE COURT: What's the name of the case?

19 MR. BINGHAM: It's called *Union Asset Management v.*
20 *Dell*, 699 F.3d 632. That's a Fifth Circuit case from 2012.
21 And the Court there says that they don't disapprove of the
22 Lodestar. They say the Court can still choose. But they do
23 say that they are joining the other circuits, majority of
24 other circuits I think is what they say, in allowing the
25 district court the discretion to use a percentage of the

1 funds in common-fund cases. And since Dell came out, I can't
2 think of a case where in a common fund, where a Court had not
3 used percentage of the fund. The *Dell* case also suggests
4 that a 25 percent should be kind of the benchmark but
5 almost -- with the exception of one case, every case is
6 used -- 33 either, either 33 percent plus expenses or
7 33 percent including the expenses. We're in the second
8 group. We're saying 33 including expenses, but I think
9 there's only one case that's not done a third since 2012.

10 The one case that didn't do it was a data-breach
11 type of case where hackers had got into the Heartland Payment
12 System's payment processing systems data. It was a
13 coupon-type settlement, and the Court valued the actual Class
14 relief at like \$1600. And that Court still awarded 20 --
15 there was injunctive relief there that the Court valued. The
16 Court -- the total value of the fund was somewhere 1-3,
17 1-4 million. And the Court awarded 20 percent of that amount
18 as the fee. Every other case -- but most of them are from
19 Louisiana. I'll have to admit that. But every other case
20 has been a third plus expenses or a third including expenses.
21 But, you know, that's up to you. And some of the objectors
22 say that's too much, you know.

23 THE COURT: Have you kept track -- have all the
24 attorneys kept track of their hours?

25 MR. BINGHAM: Yes, Your Honor.

1 THE COURT: And what would -- what percentage of
2 the total settlement would it be if we applied the Lodestar?
3 Have you figured that out?

4 MR. BINGHAM: Well, I could do it easily, we have
5 right as of today, we have 18 -- say, 1820 hours right now.
6 1819.55, and that's through I think yesterday. And then we
7 have 20, 23,196 in expenses. And so I think that comes up to
8 somewhere around 855,000 in actual time on the books as of
9 yesterday. But the case is not over. We have two objectors
10 who are notorious for filing notice of appeal.

11 THE COURT: Okay. Just stay with me. And I know
12 it could go up. As of today, what is the percentage of the
13 8.75 million that you have in attorney's fees and expenses?

14 MR. BINGHAM: It's going to be approximately
15 12 percent -- 13 percent.

16 THE COURT: So you're asking the Court to approve
17 going from about 12 percent, according to the Lodestar, up to
18 33? That's a significant -- a highly significant increase.

19 MR. BINGHAM: It's -- it's obviously an increase.
20 But it's not unjustified under the current case law because.

21 THE COURT: It's not a matter -- I know. But what
22 you told me, you told me what -- that there was no dispute.
23 That they did what they did.

24 MR. BINGHAM: Correct.

25 THE COURT: And you told me that there was somewhat

1 of a rush to settle the case because of the Supreme Court
2 case.

3 MR. BINGHAM: Right. Because otherwise we would
4 get nothing.

5 THE COURT: I think out of an abundance of
6 fairness, 33 percent is an extremely high number to be asking
7 for.

8 MR. BINGHAM: Well, as I say, the Court is going to
9 do what it's going to do.

10 THE COURT: Well, it's not a matter of what I'm --
11 I'm not doing anything. I will recommend to Judge Biery.
12 That's all I do.

13 MR. BINGHAM: Right, right.

14 THE COURT: And for those of you who may not be
15 aware of that, I am just a magistrate judge. I recommend to
16 Judge Biery. Judge Biery makes the final determination. If
17 you go from a 12 percent Lodestar and higher depending upon
18 what else has to be done, to a 33 percent attorney's fees, is
19 a significant jump in any judge's mind. And I think the
20 attorneys should have thought that out before they made that
21 request.

22 MR. BINGHAM: Well, we have. And I think as part
23 of our declarations you will see what we project we will have
24 at the end, and that the multiplier will be I think at that
25 time we said like 3.1. It's going to be under a three

1 multiplier, which is commonly approved in this circuit. And
2 we also have the injunctive relief. There's some value to
3 the injunctive relief. Our expert has put one dollar per
4 Class member on the educational value. We can't get more
5 conservative than that. On the audit procedures he has put
6 \$5, which covers a three-year period. So, you know, you're
7 talking a couple of bucks a year. That's extremely
8 conservative.

9 In these FCRA cases, injunctive relief is huge.
10 We've changed a practice. And in the Fourth Circuit, the
11 Fourth Circuit recently approved a case, *Berry v. Lexis*
12 *Nexus*, it's cited in our stuff, where the relief was
13 injunctive relief. And the Court awarded 5.2 million in
14 attorney's fees. There's value to these injunctions. So
15 when we add in the value of the injunction plus the common
16 fund, we say, one third of the common fund amount is the same
17 as 13 percent of the value of the case. And every case in
18 the Fifth Circuit places a value on the injunctive relief.
19 So, yes, if you're only looking at that component, and if
20 you're only looking at the fact that where we are today
21 versus we know we're going to have an appeal. We know we're
22 going to have a bond motion. We know we're going to have a
23 motion in the Fifth Circuit for summary affirmance if the
24 settlement is approved. We know that because the way the
25 settlement is structured, even after everything is done,

Leticia Ornelas Rangel, CSR

1 we're still in the case for like eight months. We are going
2 to have Class member calls like you can't believe because
3 we've had them. I've never experienced anything like this.
4 We're going to have so many calls, but, you know, when are we
5 getting our checks? What's the status of the appeal? It's
6 just going to go on and on. Those things are real, and
7 they're going to happen. And so if you take a snapshot right
8 now, they're entirely correct. But I would suggest that
9 there's a lot more work to go and that as a common fund every
10 single court has done percentage of the fund.

11 THE COURT: Have you computed -- that's -- let's
12 assume if you got 33 percent, how much -- and let's assume
13 that everyone that has filed a claim gets their money after
14 the 33 percent. What would each claim member get?

15 MR. BINGHAM: Right now -- and this is pretty
16 accurate, \$6.17.

17 THE COURT: That's it?

18 MR. BINGHAM: That's more than any other cases of
19 this type has paid. But that's it.

20 THE COURT: I'm not asking if it's more than any
21 other case.

22 MR. BINGHAM: No, that's it. That's it. May I
23 explain where that number comes from?

24 THE COURT: I just assume that you took a third out
25 of 8.75 million, then divide it by 411,000.

1 MR. BINGHAM: Or 73.

2 THE COURT: Into the remainder.

3 MR. BINGHAM: Right.

4 THE COURT: Is that not accurate?

5 MR. BINGHAM: That's accurate. But I don't think
6 you can ignore the fact that we have 473,000, a 22 percent
7 claim rate, which is -- you know, it's four or five times
8 more than any other case. The reason the amount is smaller
9 is because we have such extraordinary claim rates. And even
10 though the amount is \$6, it compares favorably with these
11 TCPA cases that are getting approved all over the country.
12 And under the TCPA, Telephone Consumer Protection Act, it's
13 strict liability. You get 500 bucks if you get a call to
14 your cell phone that you didn't consent to. Those cases are
15 settling for -- most of them are in the right around \$30 on a
16 \$500 claim. That's the same as \$6 on a \$100 claim. So it's
17 in the range of reasonableness. It's more than anybody else.
18 It's driven by the fact that we made it easy to file claims.
19 You know, we could have done a lot of things to stop the
20 claim rate. We didn't want to do that. We want
21 participation. You know, the big factor seems to be that we
22 paid for the return postage on the postcards because I
23 compared another--.

24 THE COURT: I'm not criticizing. Everything you
25 have done -- I'm not saying you did anything wrong. I'm just

Leticia Ornelas Rangel, CSR

1 asking what they're going to come up with, which is decreased
2 by the amount of attorney's fees that you are asking for.

3 MR. BINGHAM: No, there's no question about that.

4 THE COURT: Okay.

5 MR. BINGHAM: But everybody knew it. In our notice
6 it says one third fees, and we got two objectors. You know,
7 everybody knew it. It's consistent with what attorneys
8 charge all the time in contingency cases. And so, you know.

9 THE COURT: Well, but generally --

10 (Cross-talking.)

11 MR. BINGHAM: It's not unfair.

12 THE COURT: Generally, there's one client that gets
13 the other two thirds. In this case, it's being split among
14 400 and some-odd thousand people who get a check for \$6.17
15 that won't buy them a big Mac.

16 MR. BINGHAM: Well, but the example we use is
17 Starbucks. But we tell them there's enough to get a
18 Starbucks or two.

19 THE COURT: That's about --

20 MR. BINGHAM: But that's the difference -- I would
21 suggest that if you're going to look at it like that, you
22 have to also look at they're also paying \$6 of the attorney's
23 fees. They're not -- none of them are paying the whole
24 third. They're paying their pro rata share. So, yeah, okay.
25 I get \$6.07, but I'm not paying for the litigation. Nobody

1 paid the filing fees. Nobody is paying the lawyer. Nobody
2 is paying the administration cost. They're all paying their
3 pro rata share. No money is going back to Chase.

4 THE COURT: Let me ask you this: How many of these
5 claimants would have returned this form had they known they
6 were getting \$6.17?

7 MR. BINGHAM: You're saying the same format that --

8 THE COURT: Sure.

9 MR. BINGHAM: Yeah, probably all of them.

10 THE COURT: You really think that.

11 MR. BINGHAM: Yeah, I really think so. The
12 interest in this case --

13 THE COURT: I would have thrown it away. How much
14 are the attorneys getting out of this compared to my \$6.17?

15 MR. BINGHAM: We've had that discussion with
16 numerous Class members, and when I say, okay, here is how it
17 works. You're only getting that much, but you're only paying
18 this much. You're paying a third, you know.

19 THE COURT: You should -- right now you can sit
20 down at the table and figure out a different number. While
21 I'm talking to defense counsel, y'all need to sit down at the
22 table and figure out a different number to ask for.

23 MR. BINGHAM: We'll do that.

24 THE COURT: Is that -- what about the Cy Pres?

25 MR. BINGHAM: There's been no opposition to the Cy

1 Pres. I mentioned no money is going back to Chase. If and
2 when it's approved--.

3 THE COURT: And, again, I assume this is people
4 who, even though they filed a claim, for some reason they
5 don't cash their check or they don't get their check.

6 MR. BINGHAM: Correct.

7 THE COURT: And you can't track them down.

8 MR. BINGHAM: Correct.

9 THE COURT: And there is a fund -- is there any
10 problem with -- it sounded like y'all worked out where those
11 funds should go. I didn't see any problem with that.

12 MR. BINGHAM: Okay. Yes, we worked that out, and
13 in part because another court had already approved those two
14 organizations.

15 THE COURT: Is there any concern from the plaintiff
16 about that?

17 MR. BINGHAM: Not from the plaintiff. I think
18 Mr. Cox has a problem.

19 THE COURT: Pardon me?

20 MR. BINGHAM: I think Mr. Cox has a problem, when
21 you get to him.

22 THE COURT: I'll get to that. And as far as the
23 service payment to the Class representative? I mean, is
24 that, does that seem to be a typical amount?

25 MR. BINGHAM: It's below any in this district in

1 this type of case, yes, it's very typical. That was
2 negotiated with Chase.

3 THE COURT: Okay.

4 MR. BINGHAM: So.

5 THE COURT: All right. Thank you, Mr. Bingham.
6 I'll hear from Mr. Lewis now.

7 MR. BINGHAM: Thank you.

8 THE COURT: Mr. Levine or -- either Mr. Levine or
9 Mr. Lewis, whoever wants to go first. And, again, I will ask
10 you, since there no question about the notice, I'll ask you
11 to go through, and I'll just state them for the record. The
12 different factors that the Court of Appeals, our Court of
13 Appeals looks at in determining the fairness of the
14 settlement, the existence of fraud or collusion behind the
15 settlement, the probability of the plaintiff's success on the
16 merits, the range of possible recovery, and the complexity,
17 expense, and likely duration of the litigation, as stated,
18 the proceedings and the amount of discovery completed, and
19 the opinions of Class counsel to Class representative and
20 absent Class members.

21 MR. LEVINE: Thank you, Your Honor. I think it's
22 usually typical to let the plaintiffs do this because
23 understandably I think some judges think my job as the
24 defense counsel is to negotiate the best deal I can get, you
25 know, for my client. And so you might not trust everything I

Leticia Ornelas Rangel, CSR

1 have to say as much as the people who have the interest in
2 representing the Class. But let me go through it and explain
3 why we think, you know, we went in to negotiate. We had a
4 hard-fraught negotiations with them. We would obviously
5 prefer not to pay anything in these cases. But there's risk
6 in all litigation. And especially in the statutes like the
7 Consumer Protection Statutes, like the Fair Credit Reporting
8 Act, and the TCPA and those that have these statutory damages
9 that can add up very quickly if you're multiplying because as
10 a large financial institution you tend to engage in
11 repetitive transactions. And so if there is a problem
12 anywhere in your systems or anything like that, those can
13 multiply quickly, and you have to take into account the risk
14 of what's going to happen.

15 Here, let me actually group together -- on the
16 fraud and the collusion, there's no fraud or collusion here
17 whatsoever. I think they've explained it well in their
18 papers.

19 THE COURT: Did it actually settle in mediation or
20 after mediation?

21 MR. LEVINE: It did. It settled in mediation.

22 THE COURT: Okay.

23 MR. LEVINE: We had a settlement agreement in
24 principal.

25 THE COURT: I understood that there were some

1 things y'all still did after mediation, but it actually
2 settled in mediation?

3 MR. LEVINE: We did. After the mediation, what had
4 to happen is we had to draft up the agreement, for one. And
5 they had to do a confirmatory discovery to figure out
6 exactly, you know, as we drafted the agreement to confirm
7 everything. But we had a settlement agreement in principal
8 there. And, again, Judge Infante is one of the most
9 respected mediators in this area, and he was absolutely
10 instrumental to getting this done. I said as kind of an
11 aside, when I was looking back at things in preparing for
12 this hearing today, I went back through my notes of the
13 mediation, and as I went through each step, you know, session
14 one, session two, session three with the mediator, even
15 though I lived through it, I didn't realize -- I didn't think
16 we were going to get to a settlement looking at it, you know,
17 knowing where we wanted to end up at the end of the day. And
18 I think he was really instrumental, and it was the definition
19 of a good deal. You know, a good deal is something that
20 we're not happy with necessarily at the end of the day, but
21 we'll live with, and that's what happened here. So there was
22 no fraud or collusion whatsoever.

23 In terms of the factors about the merits, the range
24 of reasonable recovery, the complexity, the duration, those
25 factors, I think they all basically go to the merits. And

Leticia Ornelas Rangel, CSR

1 here we think we have a strong merits case. As he explained,
2 there's no intent to do these pulls. These are complicated
3 computer -- you know, computers run a lot of this stuff.
4 And, unfortunately, what we found, after, you know, the
5 litigation came, was that there were some instances where it
6 was getting pulled and they get repetitive. That said, the
7 case law here is very favorable to us, and I think there were
8 four things that were going to become very significant
9 factors for them to litigate. We couldn't count on any one
10 of those four, but they were very important.

11 The first was just the basic liability question.
12 Under the FCRA, would they be able to prove that we aren't
13 allowed to do a pull on an account of someone who was a
14 customer, but who now asserts that they no longer have a
15 credit relationship with the bank for a number of different
16 reasons. And the Fifth Circuit case law says that there's --
17 that the statute is ambiguous on that. But it doesn't say
18 that you can't have access to credit reports. The Eleventh
19 Circuit case which is -- then followed the Fifth Circuit
20 case, that's the *Levine* case, said there where there were
21 several pulls after the account was closed actually
22 considered both the liability and the willfulness question.
23 On the liability question, it said the statute was ambiguous.
24 And then on willfulness said, therefore there's no
25 willfulness liability. So we think on liability -- and then

Leticia Ornelas Rangel, CSR

1 there have been more decisions, which Mr. Bingham alluded to,
2 that have been decided more recently in district courts up in
3 Wisconsin. I believe in Minnesota as well. They are cited
4 in the plaintiff's brief. Those are the *Germain* case and the
5 *Saumweber* case where they have said, you really have to look
6 into exactly what is the nature of the relationship
7 afterwards because when you're talking about mortgages there
8 very well may be a security interest. And while the bank may
9 not be allowed to go personally collect through a suit, they
10 do still have the security interest that they can execute on.
11 And does that constitute a credit relationship? It can. So
12 that was first major obstacle.

13 The second major obstacle is willfulness because
14 under the statute the only thing you get for proving a
15 violation that isn't willful is actual damages. And this is
16 the circumstance where there are no actual damages. These
17 pulls don't show up on the credit reports at all. The only
18 people who can see them on the credit report are the
19 individual consumers themselves. But if they are applying
20 for credit from somebody else and that person has permission
21 to go look at the credit report to evaluate them for credit,
22 they will not see that there had been any pull, in any one of
23 these types of what we call soft pulls. So there were no
24 damages here. So they really have to prove willfulness, and
25 that's where everything comes down to in an FCRA case. And

Leticia Ornelas Rangel, CSR

1 as I said, because the case law itself in the Court of
2 Appeals says that the statute is ambiguous on this, that
3 would be impossible under the Safe Code Decision we believe
4 in the Supreme Court. Now is there a risk that for the
5 reasons that Mr. Bingham said that we might not persuade a
6 judge, there's always a risk I think in litigation. That's
7 what we all know from our litigation careers. But we thought
8 we had a very strong position there.

9 The third obstacle they were going to have to
10 overcome was Class certification. And as I think they had
11 said in their brief, there is no reported case of a certified
12 Class in these circumstances where Class certification was
13 contested. And indeed in the Germain case, although the
14 district court ruled on summary judgment, the Court went on
15 to say what it would have done on Class certification and why
16 Class certification was inappropriate in a case like this.
17 They would have had to overcome that.

18 And the last is the *Spokeo* case. We felt that
19 things looked pretty good when the Court granted *Spokeo*
20 because they had tried to reach this issue before. They
21 hadn't been able to reach it. It wouldn't necessarily
22 resolve the standing issue here. There are some differences
23 between the claim in that case and this one. But it looked
24 pretty good, and most of -- I think, as Mr. Bingham said,
25 most of the consumer bar also was worried. I don't know what

1 the current composition of the court now being eight members,
2 whether we have that same optimism right now. The decision
3 hasn't come down yet. But that said, we're talking about at
4 a time when we were settling this case, you know, those were
5 all major obstacles for them to overcome. That would have
6 been a long, hard-fraught litigation to get through all of
7 that for a claim that at the end of the day the only recovery
8 is possibly -- is it only possibly going to be the statutory
9 damages.

10 So at the end of the day, we think in light of the
11 range of reasonable recoveries, what they accomplished for
12 the Class here was very good. And I think that the three
13 things which really confirm why this settlement is fair,
14 reasonable, and adequate, is, as they said, number one, they
15 did -- we have agreed to a conduct provision here, which is
16 addressed to the issue that came up in the litigation, and,
17 that is, that we will have audits that are reasonably
18 designed yearly for three years to ensure, not just to have
19 the intent, but to ensure that none of these pulls are
20 happening in these circumstances. That is a great value.
21 Their expert, you know, I think acknowledges in his report
22 that it's hard to put value on it. But it is -- whether you
23 can put a monetary value on it at all, it's substantial. And
24 conceptually it's very substantial because at the end of
25 litigation they wouldn't have been able to get that. There

Leticia Ornelas Rangel, CSR

1 is no injunctive relief under the FCRA, and this -- as many
2 courts have held, including the Fifth Circuit.

3 The second reason, fair, reasonable, and adequate
4 is the monetary relief. And I take to heart your questions
5 about the \$6.17 if they were to get 33 percent of the
6 attorney's fees. But in this circumstance, that is -- first
7 of all, that is real money. Second of all, we'll have to
8 evaluate it against the range of a reasonable recovery and
9 against the type of injury, which is alleged here. And this
10 is one where there is no economic damage, no economic harm.
11 And for that reason, and given all of the hurdles they would
12 have had to overcome, that compares very favorably.

13 In fact, it really gets to the heart of what Rule
14 23 is about. Rule 23 is about having a system in which you
15 can put together these types of small claims to be litigated.
16 So I think the Class settlement here actually demonstrates
17 that Rule 23 is working the way it's supposed to. It does
18 compare favorably to other settlements. As they pointed out,
19 in the account review world, under these provisions of the
20 FCRA, there has only ever been one other settlement in which
21 there was any monetary relief whatsoever. And very
22 frequently no injunctive relief either. This one gets both.
23 And it gets the monetary relief. It compares very favorably
24 with the TCPA settlement. And, if anything, the reason
25 that, you know, \$6 might be lower than might -- what it might

Leticia Ornelas Rangel, CSR

1 have otherwise have been--.

2 THE COURT: Why are you defending their attorney's
3 fees?

4 MR. LEVINE: I'm not. I'm not defending any of
5 their attorney's fees. I was -- I have an agreement that I
6 cannot object to them, but I was just getting to your comment
7 about is \$6 worth, because you said you would have thrown it
8 away. So I just wanted to make sure to address that as an
9 issue.

10 THE COURT: I know. But that was based on the
11 amount of attorney's fees they're requesting.

12 MR. LEVINE: Okay. Well, I just wanted to address
13 the \$6. That was it.

14 THE COURT: Okay.

15 MR. LEVINE: And then the final thing, the reason
16 why, you know, it's really been shown to be fair, reasonable,
17 and adequate is that there -- the response has been
18 tremendous. In all of these, you know -- I defend Class
19 actions quite a bit, and the response rate is very good here.
20 And, in fact, you compare the very few people who wanted to
21 exclude themselves from this settlement compared to the
22 number that wanted to participate, and compare it to the very
23 few number of objections. And, frankly, the objections that
24 were received, you know, weren't all that substantial, you
25 know, including the lawyered ones. You know, they were

Leticia Ornelas Rangel, CSR

1 pretty much boilerplate. They were just kind of sentences
2 you could have taken out of the same person's objections in
3 other cases. And I think -- so for all those reasons, I
4 think it is fair, reasonable, and adequate.

5 In terms of the stage of the case at which this
6 settled, I think this, as this Court knows, we were all
7 encouraged us to talk about ADR early, and we took that
8 seriously. They served their discovery on us. We provided
9 them with the documents that they needed to know. We
10 provided them with a corporate representative deposition.
11 They took that deposition. They asked us questions all
12 during this process to find out things that they needed to
13 know. So in light of all of the hurdles that they would have
14 had to overcome, and the fact that they could have lost the
15 case, had they pushed the case through any one of those
16 hurdles -- and this is one of those situations I always say
17 as a defendant, I need to win at one of those four hurdles.
18 They need to win at all four. And if they lose at any one of
19 those, the case could be over for everyone. And, frankly,
20 the order matters. If they lose on the merits after they
21 lose the Class certification, that means the Class has a
22 judgment against them for zero. I think it was wise to do
23 what they did at this time. And I think, you know, we wanted
24 to explore it, and if it was possible, we would reach it and
25 we did.

Leticia Ornelas Rangel, CSR

1 The last factor I can't do because that's the
2 opinions of Class counsel, but they've given you their
3 opinion on that, so I'm happy to answer any questions the
4 Court may have.

5 THE COURT: And the -- and as the Class
6 representative, payment, you're okay with?

7 MR. LEVINE: Okay with both. And on the Cy Pres, I
8 would say, on top of everything else, this only is going to
9 come up if there happens to be an uncashed check, you know,
10 and to the extent that there are those uncashed checks. So
11 where there are issues in cases with Cy Pres, those are ones
12 where, you know, they're designating like a million dollars
13 for a Cy Pres or something like that. This is really out of
14 practical necessity. There needs to be a Cy Pres here just
15 because there could be some uncashed checks, and it won't be
16 economical to send them out again. We designed the Cy Pres
17 with them based on another -- based on a TCPA settlement to
18 go to organizations that really help people like the Class.
19 There are good programs for, you know, credit counseling,
20 things like that, so, yeah, we have no problem with that.

21 THE COURT: Well, and if the rate, whatever the
22 rate is going to be, we are not talking about significant
23 checks here. Did counsel happen to make some rough estimate
24 about what a Cy Pres fund might look like in this case?

25 MR. LEVINE: I don't think we have because we

Leticia Ornelas Rangel, CSR

1 always knew it would really only get down to as long as we
2 have the healthy claims rate that they wanted, it would only
3 get down to the uncashed checks, and so I don't think we have
4 ever looked at, you know, how much do we expect, what the
5 projected uncashed check rate. I don't think we have. But
6 we're happy to make sure that that -- it's important for
7 them, and I would assume it would be important for the Court
8 in approving any settlement, that that money not come back to
9 my client. So it's important for it to go out to someone
10 that would benefit the Class, and we're good with that.

11 THE COURT: Is there a rough percentage of
12 claimants that do not get their checks in Class actions, and
13 maybe the plaintiffs are best to answer that. But just so
14 that I'm -- have some idea in my head what number we're
15 talking about.

16 MR. LEVINE: There, maybe we could certainly ask
17 the settlement administrator. My guess is that it varies
18 tremendously.

19 THE COURT: Okay.

20 MR. LEVINE: The settlement administrator will
21 probably tell us, well, it depends on this factor, this
22 factor, this factor. You could use this, you could use this.
23 But I don't see it being that much here. I mean, I think
24 it's going to be really well, well, well, under 1 percent is
25 my guess.

1 THE COURT: Okay. Thank you, sir.

2 MR. LEVINE: Thank you, Your Honor.

3 THE COURT: Mr. Lewis, do you have anything to add?

4 MR. LEWIS: Nothing to add, Judge.

5 THE COURT: Okay. Does the plaintiff want to add
6 anything before I take the objections?

7 MR. BINGHAM: We're taking your suggestion to
8 heart, but I was hoping maybe there would be a little break
9 where the counsel could talk about the fee.

10 THE COURT: Well, then I'll go ahead and take the
11 objections at this time.

12 MR. BINGHAM: Thank you.

13 THE COURT: Ms. Lewis, if you would come forward,
14 please, ma'am. Ms. Lewis, the summary I have of your
15 objection is that Chase foreclosed on your condominium
16 causing you to become homeless and that you do not believe
17 this settlement is sufficient to compensate you for your
18 losses?

19 MS. LEWIS: Yes.

20 THE COURT: Is there anything else that you
21 wanted -- you're welcome to say anything else you had. Now
22 you understand that to object to the settlement--

23 MS. LEWIS: Uh-hum.

24 THE COURT: -- the settlement would allow you -- I
25 mean, if you're a member of the Class, and I assume you are a

Leticia Ornelas Rangel, CSR

1 member of the Class, you can recover actual damages if you
2 can prove that you lost your -- that your condominium was
3 foreclosed on because of what Chase did. Okay.

4 MS. LEWIS: Well, basically what I have.

5 THE COURT: Well, let me finish.

6 MS. LEWIS: Okay.

7 THE COURT: If you can prove that what Chase did in
8 this case.

9 MS. LEWIS: Uh-hum.

10 THE COURT: Not because of something else Chase
11 did.

12 MS. LEWIS: Uh-hum.

13 THE COURT: But by looking into your file after it
14 was closed.

15 MS. LEWIS: Uh-hum.

16 THE COURT: That caused them to foreclose on your
17 condominium.

18 MS. LEWIS: Uh-hum.

19 THE COURT: Now if they look into your file while
20 it was still open, that doesn't count. You understand that?
21 Do you understand that?

22 MS. LEWIS: No, no, I do not.

23 THE COURT: Okay.

24 MS. LEWIS: No, I do not. No.

25 THE COURT: Okay. Okay. This only applies to

1 people whose accounts were closed by Chase.

2 MS. LEWIS: Uh-hum.

3 THE COURT: And then Chase continued to look into
4 their files afterwards when they may not have had a right to
5 do that. Now, if they looked into your file while your file
6 was still open at Chase, technically, I'm not sure you should
7 be a member of the Class.

8 MS. LEWIS: Well, Your Honor, I did get a card.

9 THE COURT: Okay.

10 MS. LEWIS: I did get a card, and I do not
11 understand it.

12 THE COURT: Okay.

13 MS. LEWIS: That's why I'm here.

14 THE COURT: Okay. Well, let's try it again.

15 MS. LEWIS: That's why I'm here because of the fact
16 that I did not understand the purpose of why I was part of
17 this Class. Second of all, I am homeless. I do have
18 information regarding the foreclosure of my condo in Oak
19 Park. It's not in Chicago. In Oak Park, Illinois. I have
20 all of that information with me today in this court because
21 of the fact I did not understand.

22 THE COURT: Well, let's get it straightened out.

23 MS. LEWIS: And I also have the--

24 THE COURT: Okay.

25 MS. LEWIS: -- I have information stating I am

Leticia Ornelas Rangel, CSR

1 living on the streets in Illinois.

2 THE COURT: Well, let's get it straightened out.

3 MS. LEWIS: Okay.

4 THE COURT: Mr. Bingham, why would -- if her -- if
5 she was foreclosed on through Chase, I would assume she still
6 had an open account at Chase.

7 MS. LEWIS: Right. That's what I'm thinking too.

8 THE COURT: Then why would she be a member of the
9 Class?

10 MR. BINGHAM: She received a postcard notice. And
11 she also sent to us a letter, which indicated that Chase had
12 forgiven the indebtedness resulting from the foreclosure.
13 They had issued her a 1099-dash something IRS form, which is
14 a debt forgiveness form, which means she did not owe Chase
15 the money, and that's why she is in the Class. Chase
16 foreclosed, but there's no deficiency left.

17 THE COURT: Well, tell me again.

18 MR. BINGHAM: Well, there was, but it was.

19 MS. LEWIS: It's--

20 (Cross-talking.)

21 THE COURT: Just a minute -- just a second,
22 Ms. Lewis.

23 MS. LEWIS: The deficiency was \$7,000. Go ahead.
24 Okay.

25 THE COURT: Tell me again.

Leticia Ornelas Rangel, CSR

1 MR. BINGHAM: Chase foreclosed on her condominium.

2 THE COURT: Yes.

3 MR. BINGHAM: There was a--.

4 THE COURT: There was still an amount outstanding?

5 MR. BINGHAM: There was an amount outstanding, but
6 then Chase issued this IRS form 1099 something. Ms. Lewis
7 sent it to me.

8 THE COURT: Okay.

9 MR. BINGHAM: May I look at it?

10 MS. LEWIS: Yes, it's here. I put it back here.
11 And this is back in the back, but I do have it with me. It's
12 back there somewhere.

13 MR. BINGHAM: Well, so Chase foreclosed on the
14 home, the condo, and then there was a deficiency owing, and I
15 talked at length with Ms. Lewis, and I couldn't figure out --
16 it sounded to me like Chase was trying to collect from her.
17 And she shouldn't be in the Class in that case. But, you
18 know, one of those in the shower thoughts, made me think is
19 what she was talking about was a Form 1099 forgiveness of
20 debt form.

21 THE COURT: Erased her debt.

22 MR. BINGHAM: So we called her and asked her if
23 what she got from Chase had 1099 on it, and it did.

24 THE COURT: Okay.

25 MR. BINGHAM: And so Chase has forgiven -- it's

1 either 53 -- I think the amount is 53,900 and 698.82. Chase
2 forgave that amount.

3 THE COURT: Okay.

4 MR. BINGHAM: So she doesn't owe Chase. But she
5 still got her credit report pulled.

6 THE COURT: Okay. Now -- and so at some point
7 after that she qualifies to become a member of the Class
8 because after that her file was pulled and Chase looked at
9 it?

10 MR. BINGHAM: That's correct.

11 THE COURT: Okay.

12 MR. BINGHAM: That's correct.

13 THE COURT: Ms. Lewis, you are a member of the
14 Class, and you're entitled to receive a portion of the
15 settlement. But your foreclosure had nothing to do with what
16 is being alleged in this lawsuit. Therefore, what -- and I
17 have no idea about the circumstances of your foreclosure, but
18 your foreclosure occurred while you had an active account at
19 Chase Bank. And what Chase did in this lawsuit occurred
20 after you had no active account at Chase Bank. Therefore,
21 there's no way that you can be compensated in this lawsuit
22 for the foreclosure.

23 MS. LEWIS: Okay. I just wanted to know exactly
24 what was going on.

25 THE COURT: And that's -- that's all I can tell

1 you. Is that nothing that happened when you had an active
2 account at Chase can be compensated by anything in this
3 lawsuit. And so the -- so if you have any claim against
4 Chase, it would have to be done through a separate, separate
5 litigation, separate claim, but it cannot be done through
6 this lawsuit.

7 MS. LEWIS: Okay. Because I was just wanting to
8 know because like you said earlier, \$6 and 90 some cents for
9 me is not going to do -- it's not going to do anything for
10 me.

11 THE COURT: No, of course not, not as far as
12 foreclosure.

13 (Cross-talking.)

14 MS. LEWIS: You know, because of the fact that I am
15 living on the streets. I am homeless. And part of that --
16 even though I know you said it doesn't have anything to do
17 with it, but throughout the foreclosure, throughout those
18 proceedings, they kept pulling my credit, and it kept asking
19 me about credit rights, which I did not understand
20 whatsoever. So that's why I came here today with nothing in
21 my pocket, but I came here because I wanted to know exactly
22 what was going on.

23 THE COURT: Well, and you are entitled to consult
24 with a lawyer about what happened during your foreclosure,
25 but that is separate from what we're talking about in this

1 lawsuit.

2 MS. LEWIS: Okay.

3 THE COURT: Thank you, Ms. Lewis, for being here.

4 MS. LEWIS: You're welcome.

5 THE COURT: Mr. Lam. I do not have a summary of
6 your objection, sir. When did you file an objection?

7 MR. BINGHAM: Your Honor, he did not file an
8 objection. He just showed up for the hearing today, and I
9 don't know if he's actually got anything. He's just
10 attending.

11 THE COURT: Oh, you're just attending?

12 MR. LAM: Yes.

13 THE COURT: Oh, okay. That's fine. You're
14 welcome. Sorry, sir, I didn't mean to scare you. I also
15 have a Basilio and Janie Tijerina, but I don't have any
16 notice of an objection from them.

17 MR. BINGHAM: Same situation.

18 THE COURT: They're just here to observe?

19 MR. BINGHAM: Yes.

20 THE COURT: Okay. That's fine. Mr. Cox.

21 MR. COX: Your Honor, may I approach to give the
22 court reporter my name and phone number?

23 THE COURT: Sure, that's fine. And I do have
24 everything you have done in writing, so you don't need to
25 repeat everything that you have submitted before, but you're

Leticia Ornelas Rangel, CSR

1 welcome to tell me whatever you would like.

2 MR. COX: I don't intend to repeat what I've said
3 before. One of the things I do want to do is respond to the
4 personal attack that Mr. Bingham launched against me. And
5 specifically I have great offense at Docket 62, Page 89,
6 where they imply that every case I've objected in I've filed
7 an appeal and never written a brief. Approximately, almost
8 half of the cases they cite in there, nothing was done but to
9 file an objection at the district court. No appeal was
10 taken. In particular, the one case they list In re Mutual
11 Funds, no appeal was taken. They state no briefs have ever
12 been filed. Four briefs were filed with the appellate court,
13 particularly to *Country Wide, Lividia, and Forever v.*
14 *Batement*. And a brief was filed in *Dewey v. Volkswagen*, but
15 my name was not on it.

16 THE COURT: I'm really more concerned about your
17 objection to this settlement, Mr. Cox.

18 MR. COX: I understand that, but I don't want the
19 Court to think --

20 THE COURT: I'm not judging you based on what
21 happened--

22 MR. COX: Okay.

23 THE COURT: -- in other cases.

24 MR. COX: All right.

25 THE COURT: I mean, that's not as much my concern.

1 What my concern is, is what objection do you have to this
2 settlement?

3 MR. COX: It probably goes back to what somebody
4 said earlier, and you may have said it, was there a rush to
5 settlement. And I believe Mr. Bandas, in his objection noted
6 that. And when you kill a case early on with an attorney's
7 fees agreement, that raises a question. And that's what,
8 really, we have here, was we suggested you use the Lodestar
9 crosscheck against what they're saying that they've done.

10 And, secondly, they have provided me all the
11 documents, which is very courteous of them. But I don't
12 recall seeing any detailed time sheets. I think without
13 detailed time sheets, you really can't support their fee
14 based on an affidavit that said we spent this many hours. So
15 that's why I would say that there's a real problem there
16 without the time sheets showing what work was done and what
17 exactly it was done for. And if they have been filed, I
18 didn't see them, and I apologize to the Court, if they have
19 been filed. But I just haven't seen them.

20 THE COURT: And you're talking about attorney's
21 fees?

22 MR. COX: Attorneys' fees.

23 THE COURT: Is that your main complaint?

24 MR. COX: That's the main complaint.

25 THE COURT: Okay.

1 MR. COX: I raised the Cy Pres issue, but at the
2 time the notice went out, they were not specified. They have
3 specified them since then.

4 THE COURT: Okay.

5 MR. COX: And I wouldn't have picked them, but, you
6 know, that's not my call.

7 THE COURT: Okay. And I don't know that there's
8 going to be that big of a fund into that anyway.

9 MR. COX: The only thing else I would say on the Cy
10 Pres issue is sometimes the law firms involved in the cases
11 will have a highest to the recipients. It doesn't appear
12 from what they have said how they came to determine these
13 people, do we have any problem that they, you know,
14 somebody's wife is the director or an employee of one of
15 these agencies. I don't think that exists here.

16 THE COURT: Okay.

17 MR. COX: So that is really all I had was just to
18 question the attorney's fees. And I do -- and I don't recall
19 off the top of my head whether it was one third in expenses
20 or one third less expenses.

21 THE COURT: I think they were asking for one third
22 including expenses.

23 MR. COX: Okay. I wasn't sure. But that's -- I
24 wanted to just bring that to the Court's attention to make
25 sure that's what in fact what it is.

Leticia Ornelas Rangel, CSR

1 THE COURT: Yes, sir. And I think they said their
2 expenses were at this point 23,000.

3 MR. COX: Well, what about the administrative
4 expenses? Those are going to be borne by the Class then?

5 THE COURT: Does that come out of the 8.75 as well?

6 MR. COX: I believe so.

7 THE COURT: Mr. Bingham?

8 MR. BINGHAM: Yes, Your Honor, it does.

9 THE COURT: And how much -- approximately how much
10 are those?

11 MR. BINGHAM: Those are about 2.9 because we've got
12 the Class notice. That's how we get to the six, \$6.17.

13 THE COURT: Okay. So it's administrative expenses
14 of 2.9 million?

15 MR. BINGHAM: Right. The -- that's primarily due
16 to the fact that we sent out the notices. We prepaid for the
17 return claims by business reply mail. The only case I've
18 seen that's like ours, they didn't do that. But they only
19 got a 5 percent claim rate. So, in my opinion, prepaid and
20 postage made a huge difference in this case. Now, we have to
21 mail out checks, so we've got three big tranches of postage.
22 And the more claims we have, the higher the cost is.

23 THE COURT: Okay. I just wanted to ask that. Go
24 ahead, Mr. Cox.

25 MR. COX: And the only thing I would say on that,

Leticia Ornelas Rangel, CSR

1 you would have to consider that -- lump that together with
2 the attorneys' fees. As a percentage, is that reasonable?
3 And I think they have to be included that there's case law to
4 that effect. That's all I've got, Your Honor.

5 THE COURT: Thank you, sir.

6 Mr. Bingham, let me just clarify, then, you're
7 talking about taking as far as attorney's fees, one third of
8 the 8.7 million -- 7.5 million?

9 MR. BINGHAM: We are saying that, but we're saying
10 the value is 22 million. We're saying the value of the
11 settlement is 22 million. The cash plus the injunctive
12 relief. So we're taking 13 percent of the value of the
13 settlement, which is -- but also one third of the cash.

14 THE COURT: You're -- run that by me again.

15 MR. BINGHAM: Okay. In our papers, the -- our
16 expert, who is present here today, values the injunctive
17 relief, the change of practice and the educational benefit of
18 this at \$13.2 million. So you add the cash plus the value of
19 the injunctive relief, and it comes up to a number just shy
20 of \$22 million.

21 THE COURT: And how do you value it at
22 \$13.2 million?

23 MR. BINGHAM: He valued it at \$1 per Class member
24 for the educational benefit, so that's 2.2 million.

25 THE COURT: An educational benefit?

1 MR. BINGHAM: Right.

2 THE COURT: How did they get an educational benefit
3 from this?

4 MR. BINGHAM: Well, as I mentioned, they get the
5 Class notice. They see that there's a claim under the FCRA
6 for a creditor conducting their account reviews, and now they
7 know about a claim that they didn't know about before, and
8 countless people have told us that. They've called and said:
9 I appreciate that because either Chase or they have other
10 creditors doing it. They say, I didn't know it was a claim.
11 Now I do. I didn't know I could do it but -- something about
12 it, now I do. So there's that benefit, just becoming aware
13 of a claim they did not know about before.

14 And our expert, who is the nation's primary privacy
15 expert, he's testified in Congress ten times on these kind of
16 issues. He says it's worth a dollar a person for that
17 benefit at \$3 -- or \$5 over a three-year period for the
18 change of practice that Chase has agreed to implement despite
19 having no obligation to do so and despite the FCRA not having
20 injunctive relief in the Fifth Circuit at least.

21 So the change of practice and the educational
22 benefit, when you total that up times the 2.2 Class members,
23 you get the \$13.2 million. Add that to the 8.75, there's the
24 \$22 million settlement, and a third of the cash computes to
25 about 13 percent for attorneys' fees and administrative fees.

Leticia Ornelas Rangel, CSR

1 THE COURT: Do you have -- can you cite to any
2 other case where those kind of numbers have been plugged in
3 by an expert?

4 MR. BINGHAM: Well, yes, there's--.

5 THE COURT: Did you put that in your brief?

6 MR. BINGHAM: It's in our briefing. The latest one
7 is this case in the Fourth Circuit. It's pure injunctive
8 relief. The court values it.

9 THE COURT: No, I mean where there was actually a
10 find plus injunctive relief where they actually added money
11 because of the injunctive relief.

12 MR. BINGHAM: I can't think of a case -- the *De*
13 *Hoyos case v. All State* that Judge Biery did. I can't
14 remember -- I can't remember. I know it was primarily
15 injunctive relief. I can't remember if there was a cash
16 component. But the case out of the *Fourth Circuit is Berry*
17 *v. B-E-R-R-Y v. Shulman*. And there's two subclasses, and one
18 subclass got some money. But the bulk of the opinion is the
19 value of the injunctive relief, is it proper to award
20 attorneys' fees on injunctive relief. If there's no
21 injunctive relief under the FCRA, can a creditor agree to it,
22 and does that confirm that value on the Class. And that case
23 cites lots of FCRA cases where the only relief is injunction.

24 And I think there's one called -- it's also in the
25 briefing. I think -- I don't know how to pronounce it.

1 Something like Chajikin, C-H-A-J-I-K-I-N, or something like
2 that. That is primarily -- it has some cash, but it's
3 primarily injunctive relief also.

4 THE COURT: Is there anything else either side
5 would like to comment on regarding the matters that we're
6 here for today?

7 MR. RILEY: Your Honor, we'd like to get back with
8 you on attorney's fees.

9 THE COURT: You can do it by an advisory because
10 it's going to take -- I'm going to be gone for the next few
11 days, and you can do it by Monday next week. Just file an
12 advisory.

13 MR. RILEY: I'd like to make a few comments about
14 attorney fees, Your Honor, if you don't mind.

15 THE COURT: Yes, sir, go right ahead.

16 MR. RILEY: I think I would like to just point out
17 that the contingency fee attorney business is a high risk
18 business, and lot of times they come out with nothing. The
19 courts and Congress want to encourage the enforcement of the
20 FCRA and these kinds of statutes. Very few lawyers know
21 about these statutes. Very few have heard of a soft pull.
22 And it was fortuitous that this case was brought at all.
23 Ms. Duncan was -- happened to be able to read a credit
24 report, read her own credit report, see what was going on,
25 and complain about it, find the right attorney who happened

Leticia Ornelas Rangel, CSR

1 to know the right attorney, Bingham and Hervol having filed
2 this same Class action in this court five years ago for the
3 exact same violation. This is almost unique in the country.
4 It's a very, almost a weird circumstance that came together,
5 so I think those things along with the tremendous amount of
6 work involved in this, for example the calls that we get are
7 from people who have other beefs with Chase. And so we're
8 going to continue to get those as well, Your Honor. And so
9 they have foreclosure problems and other things, and they get
10 confused as to what's involved here. So this is just some
11 other factors concerning attorney fees.

12 THE COURT: Thank you, Mr. Riley. Anything else
13 from either side?

14 MR. BINGHAM: No, Your Honor.

15 MR. LEVINE: No, Your Honor.

16 THE COURT: Okay. I will enter a recommendation.
17 If you do have an advisory to make, please file it by Monday,
18 and I will submit a recommendation to Judge Biery, and both
19 sides will have an opportunity to respond to that. The court
20 is in recess.

21 THE COURT SECURITY OFFICER: All rise.

22 (Adjournment.)
23
24
25

1 -oOo-

2 I certify that the foregoing is a correct
3 transcript from the electronic sound recording of the
4 proceedings in the above-entitled matter.

5 I further certify that the transcript fees and
6 format comply with those prescribed by the Court and the
7 Judicial Conference of the United States.

8
9 Date signed: August 29, 2016.

10
11 /s/ Leticia Rangel

12 **LETICIA RANGEL**

13 United States Court Reporter

14 P.O. Box 831751

15 San Antonio, Texas 78204

16 (512)550-6886
17
18
19
20
21
22
23
24
25

Leticia Ornelas Rangel, CSR